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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 771

ALLEN DUDLEY, GRADY BENNETT, J. E. LAWTON, J. J. REDDICK, ROY PRETTYMAN, ERVIN REGAL, *Petitioners*,

v.

ORANGE COUNTY, FLORIDA, a Political Subdivision, *Respondent*.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondent herein, Orange County, a political subdivision of the State of Florida, by and through its undersigned attorneys files this its Brief in Opposition to the Petition for Writ of Certiorari heretofore filed herein and respectfully shows that said petition should be denied for the following reasons and on the following grounds:

I. The decree sought to be reviewed is not reviewable.

II. No Federal question was raised or decided.

III. The Florida Courts correctly decided the case and should be sustained.

I.

The Decree Sought to be Reviewed Is Non-Reviewable

Petitioners request a Writ of Certiorari directed to the Supreme Court of Florida to review its decision of July 16, 1962 (re-hearing of which was denied without opinion on October 11, 1962). This decision of the Supreme Court of Florida was merely an order dismissing an attempted appeal (or petition for Writ of Certiorari) from the earlier decision of the District Court of Appeal of Florida, Second District. It read in its entirety as follows:

> "The attorneys for appellee have filed a motion for an order dismissing the appeal in the above cause, and upon consideration thereof, it is ordered that said motion be and the same is hereby granted, and the appeal which was entered in this cause in the District Court of Appeal of Florida, Second District, on March 28, 1962, be and the same is hereby dismissed."

The Motion to Dismiss was upon the ground that under the provisions of Article 5, Section 4(2) of the Constitution of the State of Florida, the District Court of Appeal had the final appellate jurisdiction over the questions. (Other grounds were set out in the Motion to Dismiss but were waived by not setting them out or arguing them in appellee's Brief in the Supreme Court.)

The applicable portion of Article 5, Section 4(2) of the Constitution of the State of Florida dealing with the Supreme Court's jurisdiction reads as follows:

> Sect. 4(2) Jurisdiction.
>
> "Appeals from trial courts may be taken directly to the Supreme Court, as a matter of right, only from judgments imposing the death penalty, from

final judgments or decrees directly passing upon the validity of a state statute or a federal statute or treaty, or construing a controlling provision of the Florida or federal constitution, and from final judgments or decrees in proceedings for the validation of bonds and certificates of indebtedness. The Supreme Court may directly review by certiorari interlocutory orders or decrees passing upon chancery matters which upon a final decree would be directly appealable to the Supreme Court. In all direct appeals and interlocutory reviews by certiorari, the Supreme Court shall have such jurisdiction as may be necessary to complete determination of the cause on review.

Appeals from district courts of appeal may be taken to the Supreme Court, as a matter of right, only from decisions initially passing upon the validity of a state statute or a federal statute or treaty, or initially construing a controlling provision of the Florida or federal constitution. The Supreme Court may review by certiorari any decision of a district court of appeal that affects a class of constitutional or state officers, or that passes upon a question certified by the district court of appeal to be of great public interest, or that is in direct conflict with a decision of another district court of appeal or of the Supreme Court on the same point of law, and may issue writs of certiorari to commissions established by law." . . .

By granting appellee's motion to dismiss the Supreme Court of Florida merely agreed that the District Court of Appeal had final appellate jurisdiction over the questions raised. The decision only involved a matter of state law concerning its own court system. No federal question was involved or decided.

The following Florida cases show that the District Court of Appeal and not the Supreme Court had final

jurisdiction under the constitution of Florida: *Armstrong* v. *City of Tampa*, 106 So. 2d 407; *Carmazi* v. *Board of County Commissioners*, 104 So. 2d 727; *Lake* v. *Lake*, 103 So. 2d 639.

The order of the Supreme Court of July 16, 1962, was therefore not a "final judgment or decree rendered by the highest court of a State in which a decision could be had" under the provisions of Title 28, Sect. 1257 U.S. Code, so as to permit review of same by this Court and the petition asking for a Writ to review such order should be denied.

A very similar case decided by this Court was the case of *Randall* v. *Board of Commissioners of Tippecanoe County, Indiana*, 261 U.S. 252, 67 L. ed. 637, where this Court said:

> "... It therefore appears that the Supreme Court refused to take the case on appeal for want of jurisdiction, and the judgment of the highest court of the state in which a decision (253) in the suit could be had (Judicial Code, Sect. 237) is that of the appellate court, to which the writ should have been directed.
>
> The Writ of Error must, therefore, be dismissed. ..."

Also in the case of *Lane* v. *Wallace*, 131 U.S. Appx. cexix, and 26 L. ed. 703, this Court said:

> "The judgment of the Supreme Court of Louisiana in this case was one dismissing the suit for want of jurisdiction. Consequently, that court could not have decided the federal question presented to and passed upon by the district court. All it did was to determine that the district court was the highest court of the State in which a decision in the suit could be had. The writ of error

should, therefore, have been directed to that court instead of the Supreme Court. Such a writ can now issue if applied for and allowed in time.

The motion to dismiss is granted."

Petitioners have the burden of clearly showing that the federal question exists and was involved in the order of the court being reviewed. In case of doubt as to the nature of the decision this court will resolve the matter against its jurisdiction. See: *Norfolk and S. Turnpike Co.* v. *Virginia*, 225 U.S. 264, 269, 56 L. ed. 1082, 1086, 32 Sup. Ct. Rep. 828.

In the instant case we have merely an order dismissing the appeal. Viewed in any light petitioners have failed to show jurisdiction in this court to review the order sought to be reviewed.

II.

No Federal Question Was Raised or Decided

Under the decisions of this Court, it is clear that any right claimed under the United States Constitution, must be set up or claimed in the trial court whenever, under State practice, the highest State court, in reviewing judgments of the trial court, refuses to consider the questions not raised in the trial court. See:

Baldwin v. *Kansas*, 129 U.S. 52, 32 L. ed. 640, 9 Sup. Ct. Rep. 443; *Morrison* v. *Watson*, 154 U.S. 111, 38 L. ed. 927, 14 Sup. Ct. Rep. 995; *Erie R. Co.* v. *Purdy*, 185 U.S. 148, 46 L. ed. 847, 22 Sup. Ct. Rep. 605, *Layton* v. *Missouri*, 187 U.S. 356, 47 L. ed. 214, 23 Sup. Ct. Rep. 137.

Petitioners did not raise any Federal question in the trial court. Under Florida practice, appellate courts

will not consider questions not raised in the trial courts as is clearly shown in the 1957 case of *Mariani* v. *Schleman*, 94 So. 2d 829, at page 831 thereof where the Supreme Court of Florida said:

> ". . . (5) It is a rule of long standing that on appeal this Court will confine itself to a review of those questions, and only those questions, which were before the trial court. Matters not presented to the trial court by the pleadings and evidence will not be considered by this Court on appeal." *Jacques* v. *Wellington Corporation*, 134 Fla. 211, 183 So. 718; *Southern Liquor Distributors* v. *Kaiser*, 150 Fla. 52, 7 So. 2d, 600.

It is also basic to the jurisdiction of this court that the decision sought to be reviewed must have been one that *decided* a federal question. Unless the court actually decided a federal question, its decision is not reviewable. See:

> *Crowell* v. *Randell*, 10 Pet. 368, 9 L. ed. 458; *Commercial Bank* v. *Buckingham*, 5 How. 317, 12 L. ed. 169; *Taylor* v. *Morton*, 2 Black, 481, 17 L. ed. 277; *Hurley* v. *Street*, 14 Wall. 85 20 L. ed. 786; *Caperton* v. *Bowyer*, 14 Wall. 216, 20 L. ed. 882; *Detroit City R. Co.* v. *Guthard*, 114, U.S. 133, 29 L. ed. 118 5 Sup. Ct. Rep. 841; *Israel* v. *Arthur*, 152 U.S. 355, 38 L. ed. 474, 14 Sup. Ct. Rep. 583.

The decree sought to be reviewed did not decide any question—federal or otherwise—it merely dismissed an abortive appeal not permitted by the Constitution of the State of Florida.

III.

Florida Decree Correct

If for any reason this court should decide it does have jurisdiction, respondent respectfully suggests that the rulings of the Florida courts were correct and that petitioners have mainly concerned themselves with matters of fact which were concluded against them by the trial judge who was the sole trier of the facts in this case. The trial court ruled that the County had acted in an emergency as it was propertly authorized to do under its general police power and the Civil Defense Statute, (Chapter 252, Florida Statutes), and it decided that the situation was a temporary one, ruled that there had been no taking, found that the County was taking steps to lower the water and was constructing a permanent drainage system and directed respondent to take all possible steps to lower the waters as soon as possible to minimize any damage to petitioner. The trial court retained jurisdiction to make such further orders as might be necessary to carry out its decree. The trial court's decree itself was thus not final so as to permit any appeal therefrom. Altogether, the findings by the trial court were contrary to any possibility that the petitioners were deprived of their property without due process of law contrary to the Fourteenth Amendment to the Constitution, and the Fifth Amendment is in no way involved.

The cases petitioners cited in their brief are without exception distinguishable on the facts and the statutes and constitutions of the various states involved. The principal distinction involved is that of the permanency of the invasion and the question of the use of the police

power of the state in an emergency. Petitioners cases invariably involve such facts which impel the courts to decide that the invasion was a permanent one. This was true, for example in the case of *Pumpelly* v. *G.B. & M. Canal Co.*, 13 Wall 166, 80 U.S. 557, 20 L. ed. 557, which was a leading case on the subject in this court. In that case a private corporation, under a special Wisconsin statute, built a dam which backed up the waters of a river and totally flooded plaintiff's lands for *six years* preceding the suit. This court found that this constituted a taking. This invasion was *total and permanent* and no question as to the use of the police power of a state was involved.

Respondent also submits that the facts of this case are unique and any questions involved would not be likely to recur. Respondent respectfully requests that if this court should take jurisdiction, that the Florida cases and other authorities set out in the Appellate Court's decision of this case be carefully considered in light of the entire record, and further that due to the inexactness of the matter complained of that respondent be granted permission to orally argue such merits and to file an additional brief directed thereto.

CONCLUSION

Inasmuch as the decision sought to be reviewed was not reviewable and no federal question had been raised or decided, this Honorable Court is without jurisdiction to review such decision and the petition for certiorari should be denied. It is also apparent that the case was correctly decided upon the merits and that no such material federal question could be involved so as to require this court to grant the petition. Respond-

ent therefore respectfully submits that the petition should be denied.

Respectfully submitted,

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